IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ROXANNE MARIE NUCKOLS,
Appellant.

No. 2 CA-CR 2014-0271
Filed August 27, 2015

Appeal from the Superior Court in Pima County
No. CR20132190001
The Honorable Scott Rash, Judge

**AFFIRMED IN PART; REVERSED IN PART;
VACATED IN PART; REMANDED**

COUNSEL

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Counsel for Appellee

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Roxanne Marie Nuckols was found guilty of two counts of fraudulent scheme and artifice, two counts of forgery, and one count each of aggravated identity theft, criminal possession of a forgery device, and obtaining narcotics by fraud. The trial court sentenced her to concurrent, presumptive prison terms, the longest of which is five-years, to be followed by a seven-year term of probation. On appeal, she argues the trial court erred in admitting other acts evidence at trial and submitting duplicitous charges to the jury. She also asserts the trial court imposed an illegal sentence. For the following reasons, we reverse one of Nuckols's forgery convictions, affirm her remaining convictions, vacate two of her sentences and remand the case for resentencing on those counts.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts, resolving all reasonable inferences from the evidence against the defendant. *State v. Allen*, 235 Ariz. 72, ¶ 2, 326 P.3d 339, 341 (App. 2014). Nuckols was arrested in January 2013 after her co-defendant Karen Pagnano attempted to fill a fraudulent oxycodone prescription at a Tucson pharmacy. Pagnano told the arresting officers that Nuckols had given her a ride to the pharmacy and was waiting for her outside in the parking lot. The officers made contact with Nuckols, who denied any knowledge of the fraudulent prescription, but admitted cashing a fraudulent

check at a department store in October 2012. Nuckols was then arrested and her vehicle seized.

¶3 At the time of her arrest, Nuckols was a suspect in a separate forged checks investigation led by Detective Jessica Badine of the Pima County Sheriff's Department. In the fall of 2012, Badine had reviewed still photographs from surveillance systems at two stores showing the same person—whom Badine believed to be Nuckols—paying for merchandise with checks from an account belonging to T.L., whose home had been recently burglarized.

¶4 In December 2012, T.L. had notified Detective Badine that he received a telephone call from Nuckols's former landlord, C.M., who had found some documents bearing T.L.'s name in a shed on his property. When Badine contacted C.M., she learned he had recently initiated eviction proceedings against Nuckols and had allowed her to "store some property in the shed" for twenty-one days.[1] After Nuckols failed to retrieve the property, C.M. "chopped the lock off [the shed]" and discovered boxes of driver's licenses, credit cards, prescription pads, and bank statements belonging to several individuals. C.M. contacted many of the individuals named on the found property and then took some of the property to the Tucson Police Department. He provided Badine with the remaining property, including "several prescriptions from different doctors."

¶5 After Nuckols's arrest in January 2013, Badine obtained a warrant to search her vehicle. In it, she found several altered driver's licenses, a checkbook belonging to T.L., mail for several people residing at Nuckols's address, prescriptions "all in the name of Dr. [J.]M[.]," and a notebook listing the names and addresses of "many pharmacies." Badine contacted a number of the listed pharmacies and obtained copies of filled prescriptions similar to the ones found in Nuckols's vehicle. She also obtained copies of prescriptions filled by Nuckols at a pharmacy in Benson, Arizona in 2011 and 2012.

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[1]C.M. testified that Nuckols was the only person who had access to the shed at the time.

¶6 A subsequent search of Nuckols's residence revealed a substantial number of similar or related items, including altered checks; blank check paper; software programs to make checks; checks and identification cards belonging to other people; a number of computers and hard drives; blank prescription paper and filled-out prescriptions in the names of Dr. J.M. and Dr. S.F.; papers with other individuals' personal identifying information including addresses, dates of birth, and social security numbers; altered identification documents; and laminating plastic.

¶7 Nuckols was charged with possession of a narcotic drug for sale, aggravated identity theft, possession of a forgery device, and two counts each of fraudulent scheme and artifice, forgery, and obtaining or procuring the administration of narcotics by fraud. During trial, the court granted Nuckols's motion for judgment of acquittal on count two, possession of a narcotic drug for sale, and amended the indictment to modify counts seven and nine, obtaining or procuring the administration of narcotics by fraud, to charge lesser-included offenses of attempt. The jury was unable to reach a verdict on count seven,[2] but found Nuckols guilty on all remaining counts. She was sentenced to concurrent prison terms, to be followed by probation, as stated above. We have jurisdiction pursuant to A.R.S. §§ 12-120.21, 13-4031, and 13-4033(A)(1).

Other Acts Evidence

¶8 Nuckols first argues the trial court "committed prejudicial error by admitting other act evidence under the common plan/scheme exception set forth in Rule 404(b)[, Ariz. R. Evid.,] where the evidence did not demonstrate a commitment to a particular plan of which the charged crime [was] a part." Specifically, she challenges the admission of evidence that she had presented forged oxycodone prescriptions at a pharmacy in Benson, contending its admission was improper under Rule 404(b) and also asserting the probative value of the evidence was outweighed by the danger of unfair prejudice. *See* Ariz. R. Evid. 403. The state asserts Nuckols failed to preserve her Rule 404(b) argument, forfeiting

[2]The court declared a mistrial on count seven.

review of the issue as to all but fundamental and prejudicial error. We agree.

¶9 In a supplemental witness list and a motion in limine filed a week before trial, the state had sought a ruling on admission of prescriptions Nuckols had filled at the Benson pharmacy and the testimony of a pharmacy technician who had worked there. The state maintained the evidence was relevant to show Nuckols's "on-going plan and scheme" and the similarities between those prescriptions and the ones at issue in her trial. Nuckols did not submit a written response.

¶10 On the first day of trial, the court said it agreed with the state that the Benson evidence was relevant to show "an ongoing scheme." Nuckols objected, arguing the evidence was more prejudicial than probative, but noted "if the Court is going to rule that way, then we'll see how we can work with it." Before granting the state's motion, the trial judge provided Nuckols an opportunity to "talk [him] out of it," and "g[a]ve [her] leave to re[-]raise the objection" before the relevant testimony was offered. Nuckols did not do so.

¶11 To preserve an issue for appeal, a motion or objection must be made with specificity. *State v. Moody*, 208 Ariz. 424, ¶ 39, 94 P.3d 1119, 1136 (2004); *see also State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) (objection on one ground does not preserve issue for appeal on other grounds). Because Nuckols objected to the admission of the Benson evidence only on Rule 403 grounds, she failed to preserve the Rule 404(b) issue. *See Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d at 683; *see also State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶12 Nuckols alternatively argues she had no opportunity to make a record "regarding preclusion of that evidence under Rule 404(b)" because the state filed its motion in limine less than a week before trial, and the court "essentially ruled on the motion immediately after the State's argument but prior to hearing from defense counsel." Although the state's motion was untimely, Nuckols did not object to the late filing below, *see Henderson*, 210

Ariz. 561, ¶ 19, 115 P.3d at 607, and the trial court otherwise had discretion to hear the untimely motion, *see* Ariz. R. Crim. P. 16.1(b) ("All motions shall be made no later than 20 days prior to trial, or at such other time as the court may direct."); *State v. Colvin*, 231 Ariz. 269, ¶ 7, 293 P.3d 545, 547 (App. 2013) (trial courts have implicit discretion to hear untimely motions). Moreover, as detailed above, Nuckols had ample opportunity to preserve the Rule 404(b) issue, yet failed to do so. *See supra* ¶ 11. Accordingly, we review this issue only for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607 (fundamental error review applies when defendant fails to object to alleged trial error). We review the Rule 403 issue, however, under a harmless error standard. *See id.* ¶ 18 (alleged trial error considered under harmless error standard when objection made below).

Rule 404(b), Ariz. R. Evid.

¶13 "Other acts" evidence generally is inadmissible "to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). But such evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

¶14 Nuckols relies, inter alia, on *State v. Ives* for the proposition that a proponent of other act evidence to prove a common scheme or plan "must demonstrate that the other act is part of 'a particular plan of which the charged crime is a part,'" and a trial court's inquiry under Rule 404 thus must "focus on whether the acts are part of an over-arching criminal plan, and not on whether the acts are merely similar." 187 Ariz. 102, 106, 109, 927 P.2d 762, 766, 769 (1996), *quoting State v. Ramirez Enriquez*, 153 Ariz. 431, 433, 737 P.2d 407, 409 (App. 1987). Nuckols argues the evidence of her acts at the Benson pharmacy was inadmissible as impermissible "propensity" evidence, offered for no other purpose than to suggest "that because [she] had previously passed fraudulent prescriptions in Benson, she must have done so in Tucson." We disagree.

¶15 In *Ives*, our supreme court held that evidence of a defendant's alleged molestation of four different victims, "separated in time by as much as seven years or more," 187 Ariz. at 108-09, 927 P.2d at 768-69, would be inadmissible under Rule 404 to prove a "plan," concluding that mere "'similarities where one would expect differences'" was an insufficient basis for admission, *id.* at 108, 927 P.2d at 768, *quoting State v. Walden*, 183 Ariz. 595, 605, 905 P.2d 974, 984 (1995). And, in *Ramirez Enriquez*, this court determined that testimony about a defendant previously selling marijuana was inadmissible to prove his "plan" to commit the marijuana sale with which he had been charged. 153 Ariz. at 432-33, 737 P.2d at 408-09. We explained,

> The common plan or scheme exception does not permit proof that the defendant is a long time drug dealer or burglar. Instead it permits proof of his commitment to a particular plan of which the charged crime is a part. It is a matter of the particularity of the plan and thus of the probative force of the connection between one crime and another.

Id. at 432-33, 737 P.2d at 408-09.

¶16 In contrast here, the trial court reasonably could conclude, for the purpose of admissibility, that the Benson incidents and the charged offenses were part of an overarching scheme involving forged oxycodone prescriptions purportedly issued by the same physician victim. Further, the prescriptions contained similar handwriting and dosage information, and as the state points out, had the Benson incidents occurred in Pima County, "they undoubtedly would have been prosecuted in the present case because, notwithstanding the particular county in which [Nuckols] and/or Pagnano sought to fill the forged prescriptions involving Dr. [J.M.], each of those incidents was part of a common scheme to use forged prescriptions by Dr. [J.M.]" Given the strong connection to the charged offenses, we find no error, much less fundamental error in the trial court's admission of the Benson evidence under

Rule 404(b)'s common scheme exception. *See id.*; *see also Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

Rule 403, Ariz. R. Evid.

¶17 Nuckols next contends the Benson evidence was improperly admitted because "the danger of unfair prejudice clearly outweighed any probative value." Rule 403 provides that courts "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Evidence creates the risk of unfair prejudice if it has "'an undue tendency to suggest decision on an improper basis, such as emotion, sympathy or horror.'" *State v. Butler*, 230 Ariz. 465, ¶ 33, 286 P.3d 1074, 1082 (App. 2012). "Because the trial court is best situated to conduct the Rule 403 balance, we will reverse its ruling only for abuse of discretion." *State v. Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d 564, 584 (2002).

¶18 The record provides no reason to disturb the trial court's ruling based on Rule 403 considerations. At the very least, the Benson evidence was probative to rebut Nuckols's claim that she was not knowingly involved in the prescription forgeries. Moreover, though the Benson evidence was harmful to Nuckols's defense, it was not unduly prejudicial, particularly in light of the charges brought and the other evidence presented. *See State v. Martinez*, 230 Ariz. 208, ¶ 21, 282 P.3d 409, 414 (2012) (not all harmful evidence is unfairly prejudicial, only evidence suggesting decision based on improper basis such as emotion, sympathy, or horror). It is clear the probative value of the Benson evidence was not substantially outweighed by any prejudicial effect, and the trial court committed no error in admitting it. *See State v. Burns*, 237 Ariz. 1, ¶ 51, 344 P.3d 303, 320 (2015).

Duplicitous Indictment

¶19 Nuckols next argues the trial court committed fundamental, prejudicial error by submitting "duplicitous forgery

charges to the jury."[3] Specifically, she contends "evidence was presented [at trial] to support all three distinct offenses contained in each count of forgery, thereby creating a real danger of a non-unanimous jury verdict." The state argues that, even assuming the indictment was duplicitous, no reasonable grounds exist to suggest the jury failed to reach a unanimous verdict on the forgery charges because, based on the evidence presented, the state could only prove Nuckols's culpability under a theory of accomplice liability.

¶20 "Article 2, Section 23 of the Arizona Constitution guarantees a defendant the right to a unanimous jury verdict in a criminal case. A violation of that right constitutes fundamental error." *State v. Davis*, 206 Ariz. 377, ¶ 64, 79 P.3d 64, 77 (2003). A duplicitous indictment—one charging multiple offenses within a single count—presents a risk of a non-unanimous jury verdict. *See State v. Paredes-Solano*, 223 Ariz. 284, ¶¶ 4, 17, 222 P.3d 900, 903, 906 (App. 2009). Whether an indictment or charge is duplicitous is a legal question this court reviews de novo. *State v. Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d 756, 759 (App. 2005).

¶21 Counts six and eight of the indictment charged Nuckols and Pagnano with forgery on January 5, 2013, and January 30, 2013, respectively, "by falsely making, completing or altering a written instrument and/or knowingly possessing a forged instrument and/or offering or presenting an instrument which is forged whether accepted or not, or which contains false information, to wit: a prescription, in violation of A.R.S. § 13-2002." Forgery occurs under § 13-2002 if, with the intent to defraud, a defendant:

1. Falsely makes, completes or alters a written instrument; or

2. Knowingly possesses a forged instrument; or

[3]Nuckols concedes she is limited to fundamental error review because she did not raise this issue in the trial court.

> 3. Offers or presents, whether accepted or not, a forged instrument or one that contains false information.

A.R.S. § 13-2002(A). The three types of forgery enumerated in § 13-2002 are distinct offenses with separate elements, not merely different manners of committing the same offense. *See State v. King*, 116 Ariz. 353, 355, 569 P.2d 295, 297 (App. 1977) ("forging" and "uttering" a false instrument, though proscribed by same statute, are "actually distinct offenses"); *State v. Reyes*, 105 Ariz. 26, 27, 458 P.2d 960, 961 (1969) (though forgery and uttering have been coupled under "forgery," distinction as separate offenses must still be observed since elements are not the same and proof required may differ; "uttering" is the "passing or publishing" of a false or altered document).

¶22 Here, counts six and eight of the indictment alleged three separate criminal acts drawn from the three subsections in § 13-2002(A). At trial, the state produced evidence that Nuckols committed at least two of those acts: that she falsely made, completed or altered the prescriptions in violation of § 13-2002(A)(1), and that she knowingly possessed a forged instrument in violation of § 13-2002(A)(2).[4] It also produced evidence that Nuckols aided Pagnano in presenting forged prescriptions in violation of § 13-2002(A)(3). Thus, the indictment alleged multiple offenses within a single count and was duplicitous on its face. *See Paredes-Solano*, 223 Ariz. 284, ¶ 16, 222 P.3d at 906.

¶23 "That an indictment is duplicitous does not, by itself, require reversal; a defendant must prove actual prejudice." *Id.* ¶ 17. A defendant establishes prejudice by demonstrating the jury may have reached a non-unanimous verdict. *State v. Delgado*, 232 Ariz. 182, ¶ 19, 303 P.3d 76, 82 (App. 2013). However, an error potentially resulting from a duplicitous indictment may be cured "when the

[4]The jury also heard evidence that Nuckols presented forged prescriptions in violation of § 13-2002(A)(3) on numerous occasions, but not on the dates alleged in counts six and eight.

basis for the jury's verdict is clear, when the state elects for the jury which act constitutes the crime, or when the trial court instructs the jury that it must agree unanimously on the specific act constituting the crime." *Paredes-Solano*, 223 Ariz. 284, ¶ 17, 222 P.3d at 906 (error potentially resulting from duplicitous indictment may be cured when basis for jury verdict clear).

¶24 Here, it is clear the jury based its guilty verdict as to count six on § 13-2002(A)(1), falsely making, completing, or altering a written instrument with intent to defraud. Unlike the January 30 incident, the jury received no evidence that Nuckols was physically present at the pharmacy when Pagnano presented the forged prescription on January 5; nor was there any evidence she was in possession of a forged instrument on that date. *See* § 13-2002(A)(2), (3). Instead, the state presented evidence and argued that Nuckols assisted in the January 5 forgery by creating the forged prescriptions and giving them to Pagnano to present at the pharmacies, in violation of § 13-2002(A)(1).[5] In closing argument, the prosecutor stated:

> Where the forgery comes in for . . . count [six] is that that's a fake prescription. Somebody had to create that document, and I submit to you that it was [Nuckols]; that because of the similarities between the ones . . . in Benson to the ones that are found in her home, they're all very similar to th[e] one that was passed on the 5th.

[5]From the evidence presented, a reasonable jury could have found Nuckols guilty of § 13-2002(A)(1) independently or as an accomplice, but these alternative theories do not create the risk of a non-unanimous jury. *See* A.R.S. § 13-303; *State v. Woods*, 168 Ariz. 543, 544, 815 P.2d 912, 913 (App. 1991) ("being an accomplice is not a separately chargeable offense; it is merely a theory that the state may utilize to establish the commission of a substantive criminal offense").

¶25 In light of the theory offered by the state and the record presented—one which was void of any evidence showing Nuckols was physically present on January 5 when Pagnano offered the fraudulent prescription—it is clear the jury found Nuckols "[f]alsely ma[d]e[], complete[d] or alter[ed]" the prescriptions. § 13-2002(A)(1). And because the basis for the jury's verdict is clear, we are satisfied that the error resulting from the duplicitous indictment did not result in a non-unanimous verdict on count six; we therefore affirm that conviction. *See Paredes-Solano*, 223 Ariz. 284, ¶ 17, 222 P.3d at 906.

¶26 We cannot say with certainty, however, that the jury reached a unanimous verdict as to the January 30 incident. Similar to the January 5 forgery, the state argued Nuckols assisted in the January 30 forgery by "altering" or "creating" the prescription presented by Pagnano. But as Nuckols notes, the state presented evidence during its case-in-chief that she committed "all three violations of the forgery statute" on January 30.

¶27 Unlike the January 5 forgery, the jury also received evidence that Nuckols knowingly possessed forged prescriptions on January 30, in violation of § 13-2002(A)(2). Detective Badine testified that she found "blank prescriptions" and prescriptions she "kn[e]w to be fraudulent" in Nuckols's vehicle,[6] along with a composition notebook belonging to Nuckols containing names and addresses of numerous pharmacies and personal information belonging to other individuals. The jury also heard that Nuckols provided Pagnano with the means and opportunity to present the forged prescription on January 30 by driving her to the pharmacy. Thus, the jury could have found Nuckols intentionally aided Pagnano in presenting the forged prescription, in violation of § 13-2002(A)(3). *See* A.R.S. § 13-301 (person acts as accomplice if, acting with intent to promote or facilitate commission of offense, provides means or opportunity to another person to commit offense); *see also State v. King*, 226 Ariz. 253, ¶ 16, 245 P.3d 938, 943 (App. 2011) (to base criminal liability for

[6]Though not searched until a later date, Nuckols's vehicle was "confiscated" and "secured" on January 30 at the time of her arrest.

substantive offense on accomplice theory, state need only show defendant facilitated commission of that offense committed by principal).

¶28 Based on the evidence presented, some jurors may have believed Nuckols created the forged prescriptions, while others may have instead found she provided Pagnano with the means to present the forged prescription by driving her to the pharmacy. Since the basis for the jury's verdict on count eight is not clear, and it was not instructed that it was required to agree unanimously on the specific act constituting the crime, we cannot state with certainty that the jury reached a unanimous verdict. *See Delgado*, 232 Ariz. 182, ¶ 19, 303 P.3d at 82. We thus conclude Nuckols was deprived of her right to a unanimous jury verdict on count eight of the amended indictment, and the error, therefore, was both fundamental and prejudicial. *See id.*; *Paredes-Solano*, 223 Ariz. 284, ¶ 22, 222 P.3d at 908.

Illegal Sentence

¶29 Finally, Nuckols contends the trial court imposed an illegal sentence on count nine of the indictment by imposing "the presumptive term for a class three felony when she had only been convicted of a class four felony and no aggravating factors had been . . . proven." The state agrees the trial court sentenced Nuckols in error, but argues this court need not "decide the specific basis of the trial court's error/inconsistency." Rather, it contends remand is only necessary so the court "can clarify its original intent and the nature of its error and resentence [Nuckols] as necessary."

¶30 Because Nuckols failed to raise this claim below, we review the trial court's decision for fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Imposition of an illegal sentence is always fundamental, prejudicial error. *State v. McPherson*, 228 Ariz. 557, ¶ 4, 269 P.3d 1181, 1183 (App. 2012).

¶31 An attempt to commit a class-three felony is designated a class-four felony. A.R.S. § 13-1001(C)(3). The presumptive sentence for a non-repetitive class-four felony is 2.5 years

imprisonment. A.R.S. § 13-702(D). "Under Arizona's noncapital sentencing statutes, the maximum punishment authorized by a jury verdict alone, without the finding of any additional facts, is the presumptive term." *State v. Johnson*, 210 Ariz. 438, ¶ 10, 111 P.3d 1038, 1041 (App. 2005). Since no aggravating factors were alleged or found by the jury or the court, and the trial court sentenced her to a term higher than the presumptive, we agree that Nuckols's sentence on count nine is illegal and constitutes fundamental, prejudicial error.

Disposition

¶32 For the foregoing reasons, we reverse Nuckols's conviction and vacate her sentence for count eight, vacate her sentence for count nine, and remand for resentencing on that count. Her remaining convictions and sentences are affirmed.